In the Supreme Court of the United States.

OCTOBER TERM, 1975.

No. 75-1824

ANTRANIK MALAJALIAN,
PETITIONER,

v.

UNITED STATES,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Claims.

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BATEMAN & SLADE, INC., BOSTON, MASSACHUSETTS.

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In the Supreme Court of the United States.

OCTOBER TERM, 1975.

No.

ANTRANIK MALAJALIAN,
PETITIONER,

v.

UNITED STATES,
RESPONDENT.

Petition for Writ of Certiorari to the United States Court of Claims.

The petitioner, Antranik Malajalian, prays that a writ of certiorari issue to review the order and judgment of the United States Court of Claims entered in this proceeding on March 19, 1976.

Opinion Below.

There was no opinion accompanying the order of the United States Court of Claims, which is reproduced in the Appendix at page 11. The opinion of the United States Court of Appeals in a related proceeding is officially reported in *Malajalian* v. *United States*, 504 F. 2d 842 (1st Cir. 1974), and is reproduced in the Appendix at pages 1-6.

Jurisdiction.

The judgment sought to be reviewed is an order of the United States Court of Claims in *Malajalian* v. *United States*, No. 421-73, dated March 19, 1976, which dismissed the petitioner's petition for tax refund (App. 11).

This Court's jurisdiction is invoked under 28 U.S.C. § 1255.

Questions Presented.

(1) Whether the Court of Claims can dismiss a plaintiff's petition because the plaintiff failed to appear before a trial judge of the court to be examined on oath where the relevant statute (28 U.S.C. § 2504) confers no authority for dismissal, but merely states that the case shall not be tried until the plaintiff complies with such order.

(2) Whether the constructive notice given to the petitioner was reasonable notice as required by the statute where the petitioner is a foreign national at a time of great civil disorder in his country.

(3) Whether the dismissal of the petitioner's case without giving him actual notice is a deprivation of his property without due process of law in violation of the Fifth Amendment to the United States Constitution where the petitioner is a resident of a foreign country at a time of great civil disorder in that country.

(4) Whether the order of the Court of Claims dismissing the petitioner's claim deprived the petitioner's lawful heirs of due process of law when it is not known whether petitioner is dead or alive and the circumstances make it impossible at this time to ascertain the identity of the petitioner's heirs.

Constitutional and Statutory Provisions Involved.

The constitutional provision involved is the Fifth Amendment to the United States Constitution which provides:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Statutory provisions involved in this case are Title 28 U.S.C. § 2504:

> "The Court of Claims may, at the instance of the Attorney General, order any plaintiff to appear, upon reasonable notice, before any commissioner of the court and be examined on oath as to all matters pertaining to his claim. Such examination shall be reduced to writing by the commissioner, and shall be returned to and filed in the court, and may, at the discretion of the attorneys for the United States, be read and used as evidence on the trial. If any plaintiff, after such order is made and due and reasonable notice thereof is given to him, fails to appear, or refuses to testify or answer fully as to all material matters within his knowledge, the court may order that the case shall not be tried until he fully complies with such order."

Title 28 U.S.C. § 1255:

> "Cases in the Court of Claims may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted on petition of the United States or the claimant;
>
> "(2) By certification of any question of law by the Court of Claims in any case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions on such question."

Title 28 U.S.C. § 1491:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States

> founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.
>
> "Nothing herein shall be construed to give the Court of Claims jurisdiction in suits against, or founded on actions of, the Tennessee Valley Authority, nor to amend or modify the provisions of the Tennessee Valley Authority Act of 1933, as amended, with respect to suits by or against the Authority."

Statement of the Case.

The petitioner, Antranik Malajalian, who is a foreign national, entered the United States under a business visa on April 22, 1972, and remained as a nonresident alien until June 22, 1972, after a requested extension of his business visa was denied, thereby making his departure mandatory (App. 1). On June 20, 1972, as the petitioner was preparing to depart for London from Logan Airport in Boston, an inspection of his baggage disclosed $147,545 in United States currency which was seized therefrom by United States Customs agents. Pursuant to 16 U.S.C. §§ 6851 and 6861, the Internal Revenue Service, subsequent to petitioner's departure, terminated the taxable year, made two jeopardy assessments and seized $131,331 of the currency then in possession of the Customs agents (App. 1-2).

The petitioner, through his attorney, took steps to have his money returned. He filed a tax return declaring that he had no taxable income and requesting a refund of the amount seized; and he brought an action for conversion in the United

States District Court for the district of Massachusetts against the Customs agents who had seized his money (App. 2). The conversion action was subsequently settled when $15,244, representing the amount remaining after the jeopardy assessments, was returned to petitioner's attorney-in-fact. After more than six months had passed without action on the claim of refund by the Commissioner of Internal Revenue, the petitioner instituted suit for refund in the United States District Court for the District of Massachusetts (App. 2). That court granted the government's motion to dismiss on grounds of improper venue, and the decision was affirmed on appeal in *Malajalian* v. *United States*, 504 F. 2d 842 (1st Cir. 1974) (App. 1-6).

The petitioner, pursuant to 28 U.S.C. § 1491, brought his claim for refund in the United States Court of Claims on November 11, 1973. Acting on the government's motion under 28 U.S.C. § 2504, the Court of Claims on March 14, 1975, ordered the petitioner to appear and give testimony before a trial judge (App. 7-8). As a result of a fruitless attempt by the American Embassy in Beirut, Lebanon, and several fruitless attempts by counsel for the petitioner either to serve the petitioner with a copy of the court's order or to otherwise notify him of the order itself, fruitless because of the hostilities in Lebanon, the hearing date was rescheduled on different occasions.

On November 3, 1975, a hearing was held on the court's own motion to show cause why the plaintiff's motion for summary judgment should not be denied and why his "petition should not be dismissed for his failure to comply with the court's order of March 14, 1975" (App. 9). At that hearing, the government's attorney brought to the court's attention the fact that the petitioner had been listed as a deserter from the French Foreign Legion since May 20, 1975, a fact subsequently verified by petitioner's counsel (App. 9).

By order dated November 14, 1975 (App. 9-10), and subsequent orders of the trial judge, a date of January 8, 1976, was set for Mr. Malajalian to appear in Boston and give testimony. When notified by counsel that Mr. Malajalian had not received any notice of his obligation to appear and give testimony despite counsel's efforts to locate him, the trial judge referred the matter to the Court of Claims for action. On March 19, 1976, the Court of Claims ordered the case dismissed (App. 11).

Reasons for Allowing the Writ of Certiorari.

The power of the Court of Claims to order dismissal of a plaintiff's action because of failure to comply with an order personally to be examined on oath before a commissioner of the court has not been settled by this Court. The action of the Court of Claims in this case, if allowed to stand, would enable the government to deprive a person of property without the opportunity for the person ever to be heard on the merits of his claim. Such power has not been authorized by the Congress as it has specifically provided that the case shall not be tried until the claimant fully complies with the order. 28 U.S.C. § 2504. Nowhere is it stated or implied that the Court of Claims can dismiss the action, and by its terms the statute precludes dismissal.

In all the reported cases the Court of Claims has consistently expressed the view that the only penalty imposed on a plaintiff who refuses or fails to appear for such an examination is that he shall not have a trial of his case until such time as he submits to the examination. *Atlantic Contracting Co.* v. *United States*, 40 Ct. Cl. 244, 250, 252 (1905); *see, e.g.*, *Globe Works* v. *United States*, 45 Ct. Cl. 497, 508 (1910);

Atchison, Topeka and Santa Fe R.R. v. *United States*, 15 Ct. Cl. 1, 5, 11 (1879); *Macauley's Case*, 11 Ct. Cl. 575, 576, 578 (1875). *See also Earhart* v. *United States*, 30 Ct. Cl. 343, 345 (1895); *Truitt* v. *United States*, 30 Ct. Cl. 19, 25-28 (1895). This interpretation is consistent with the express provisions of 28 U.S.C. § 2504.

The purpose of the statute is to assist the government, which is the defendant in every suit in the Court of Claims, to prepare its case, *Truitt* v. *United States*, 30 Ct. Cl. 19, 26-27 (1895), and the approach taken by the Court of Claims in the past is consonant not only with the express provision of the statutes but also with common sense, because no harm can befall the government until a plaintiff successfully prosecutes his claim. The dismissal of this case for the reason stated represents a radical and dangerous departure from the accepted, usual and fairminded approach heretofore followed by the Court of Claims, and allows the government, with the court's imprimatur, to use the statute as a sword rather than as a shield.

Allowed to stand, the decision of the Court of Claims confers on the Internal Revenue Service the tacit authority to seize the funds of a nonresident and deprive him of the opportunity to present his claim for a refund. The only forum available is the Court of Claims, and the use of 28 U.S.C. § 2504, a statute peculiar to that court, to dismiss the case, even though counsel for the claimant is ready to proceed, deprives him of his property without a hearing. Whenever, through fortuitous circumstances, it becomes impossible to locate a nonresident (or any other plaintiff who chooses the Court of Claims as the forum in which to seek relief) or to ascertain whether or not he is still living, the government may move for an examination under 28 U.S.C. § 2504, and, by this method, successfully confiscate a litigant's property without so much as affording that litigant an opportunity to be heard.

The seizure and confiscation of the funds of nonresidents visiting this country for business or pleasure, and the procedure involved in their return, present an important public question which involves the relationship between the United States and residents of foreign countries and which could possibly affect the procedures that foreign governments apply toward American tourists and businessmen in similar situations.

Conclusion

For the reasons set forth above a writ of certiorari should issue to review the judgment of the United States Court of Claims.

Respectfully submitted,

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Appendix.

United States Court of Appeals
For the First Circuit

No. 74-1128

ANTRANIK MALAJALIAN,

PLAINTIFF, APPELLANT,

v.

UNITED STATES OF AMERICA,

APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before McENTEE and CAMPBELL,
Circuit Judges, and MOORE,* *Senior Circuit Judge.*

Henry A. Follen, Jr., for appellant.

Alfred S. Lombardi, Attorney, Tax Division, Department of Justice, with whom *Scott P. Crampton*, Assistant Attorney General, *James N. Gabriel*, United States Attorney, *William A. Brown*, Assistant United States Attorney, *Meyer Rothwacks*, and *Michael L. Paup*, Attorneys, Tax Division, Department of Justice, were on brief, for appellee.

October 22, 1974

McENTEE, *Circuit Judge.* Taxpayer appeals from an order of the district court dismissing his complaint for improper venue. We affirm.

Taxpayer Malajalian, a resident of Beirut, Lebanon, entered the United States under a business visa on April 22, 1972, and remained as a non-resident alien until June 22, 1972, at which time he left this country. On June 20, as the taxpayer was preparing to depart for London from Logan Airport in Boston, a routine inspection of his baggage dis-

* Of the Second Circuit sitting by designation

closed $147,595 in bills of small denomination. Notified of the discovery of this treasure-cache, the Internal Revenue Service terminated taxpayer's tax year under § 6851 of the Internal Revenue Code and made two jeopardy assessments against him totaling $131,331. When this amount was levied upon and seized out of taxpayer's funds, still in the possession of the Customs Bureau, he filed a tax return declaring that he had no taxable income for his truncated 1972 tax year and requesting a refund of the amount seized. After more than six months had passed without action on the claim by the Commissioner, taxpayer instituted suit for refund in the United States District Court for the District of Massachusetts. The court granted the government's motion to dismiss on grounds of improper venue, and this appeal followed.

Section 1346 of the Judicial Code endows the district courts with jurisdiction, concurrent with the Court of Claims, over civil actions against the United States for the recovery of internal revenue taxes alleged to have been erroneously assessed and collected. Section 1402(a)(1) restricts venue in actions against the United States to the district where the plaintiff resides. Since taxpayer, an alien, concededly does not reside in Massachusetts, he cannot lay venue there if § 1402(a)(1) is read literally.

Recently, in a patent infringement suit against an alien, *Brunette Machine Works, Ltd.* v. *Kockum Industries, Inc.*, 406 U.S. 706, 710 & n.8 (1972), the Supreme Court reiterated its longstanding view that "Congress does not in general intend to create venue gaps, which take away with one hand what Congress has given by way of jurisdictional grant with the other." The Court reasoned that "venue provisions are designed, not to keep suits out of the federal courts, but merely to allocate suits to the most appropriate or convenient federal forum." However, it was easier for

the Court in *Brunette* to avoid a venue gap than it is in the instant case. First, *Brunette* involved construction of conflicting statutory provisions rather than the necessity to read language into a single governing provision. Second, the traditional judicial view that suits *against* aliens are outside the scope of venue laws does not generally carry over to suits *by* aliens.

Taxpayer can derive little consolation from the holding of *United States* v. *New York & O.S.S. Co.*, 216 F.61 (2d Cir. 1914), an admiralty suit under the Tucker Act in which a non-resident alien was permitted to sue upon an express finding that respondent had waived its venue objection. *See also Choremi* v. *United States*, 28 F.2d 913 (D. Mass. 1928). The court declined to venture an opinion as to the result that would obtain if, as in the instant case, there had been no waiver.

Taxpayer next cites a series of cases decided under the Suits in Admiralty Act, 46 U.S.C. §§ 741-752 (1970), which has its own venue provision permitting suits against the United States in the district where libelants reside or have their principal place of business or in which the vessel or cargo charged with liability may be found. 46 U.S.C. § 742 (1970). Although there is at least one case to the contrary, *The Elmac*, 285 F. 665 (S.D. N.Y. 1922), the courts construing this provision have generally allowed non-resident aliens to bring suit in any district on grounds that otherwise they would have no forum in which to sue. *See McGhee* v. *United States*, 154 F.2d 101 (2d Cir. 1946); *Metaxas* v. *United States*, 68 F.Supp. 667 (S.D. Cal. 1946); *Middleton & Co.* v. *United States*, 273 F. 199 (E.D. S.C. 1921); *Kulukundis* v. *United States*, 132 F.Supp. 477 (Ct. Cl. 1955). Apart from the fact that these decisions are predicated upon a special statutory provision, they are inapposite here because the taxpayer, unlike the claimants in the admiralty

actions, may repair to the Court of Claims to press his suit, an alternative forum in which his alienage will pose no obstacle.*

Legislative history of relevant statutory provisions in fact provides some evidence that Congress was aware of the venue gap existing as to tax refund suits by aliens against the United States in the district courts. Prior to 1966, an alien individual had two possible avenues open for a tax refund suit, without regard to the forum at issue here. An alien before 1966 could sue for a tax refund in the Court of Claims if the country of which he was a citizen permitted itself to be sued by citizens of the United States having claims against it. 28 U.S.C. § 2502 (1970). But even without reciprocity an alien could sue the collecting director in the district court where the director resided, since suit against the collecting director is not, at least in form, a suit against the United States. *See* H.R. Rep. No. 1915, 89th Cong., 2d Sess. 6 (1966). In 1966 Congress abolished refund suits against collecting officers. Act of Nov. 2, 1966, Pub. L. 89-713, § 3(a), 80 Stat. 1108, codified at 26 U.S.C. § 7422(f) (1970). By thus restricting the taxpayer to his judicial district of residence (i.e., in suits against the United States), Congress sought to prevent forum-shopping by taxpayers looking to the district where the tax collector resided. H.R. Rep. 1915, 89th Cong., 2d Sess. 6 (1966). Congress apparently recognized the effect this abolition would have on aliens:

* The taxpayer correctly asseverates that if forced to resort to his remedy in the Court of Claims he will no longer be entitled to a jury trial as he would in the district court under 28 U.S.C. § 2402 (1970). His contention that he must therefore be afforded access to the district court to assert his jury trial "right" overlooks the fact that the constitutional jury trial guarantee is inapplicable in tax refund suits. *Wickwire* v. *Reinecke*, 275 U.S. 101, 105-06 (1927). While an alien who must sue in the Court of Claims lacks the choice between forums available to a resident and may incur additional time and travel costs, this slight unequal treatment does not amount to a convincing Equal Protection claim in view of Congress' apparent desire to have all alien suits brought in one court, the Court of Claims.

> ". . . in order to preserve the right of aliens and foreign corporations to bring tax refund suits, the bill also modifies present law by permitting aliens and foreign corporations to bring such suits directly against the United States irrespective of whether the foreign country of citizenship or incorporation allows itself to be sued by U. S. citizens or corporations." *Id.*

Implicit in this statement is the awareness and conclusion that an alien not "residing" in any judicial district could not sue the United States in any district court. In the view of the writers of the congressional reports, the 1966 legislation was enacted "only because other adequate remedies either are already available, or are being made available by this bill, for the recovery of illegal collections." *Id. See also* S. Rep. No. 1625, 89th Cong., 2d Sess. 6-7 (1966-2 Cum. Bull. 803, 807-08).

The taxpayer also adverts to several statutory provisions to support his position. Section 1402(a)(2) of the Judicial Code accords non-resident alien *corporate* taxpayers the privilege of bringing suit in the district where the tax return was filed. Nowhere in the meager legislative history of this provision do we find the slightest hint that Congress intended its benefits to extend to individuals. S. Rep. No. 2445, 85th Cong., 2d Sess., in U.S. Code Cong. & Ad. News 5263, 5265. In fact it was adopted in response to conflicting decisions in the federal courts concerning the residence of corporations. The legislators did recognize that the bill would cover the apparent problem of lack of venue for foreign corporations. H.R. Rep. No. 1715, 85th Cong., 2d Sess. 2 (1958); S. Rep. No. 2445, *supra*, citing *Argonaut Navigation Co.* v. *United States*, 142 F.Supp. 489 (S.D. N.Y. 1956). Nor is venue proper in the district court for an alien, individual or corporate, in any other of the various types of suits brought under the Tucker Act. 7B

Moore, Federal Practice § 1402, at JC 598.1 (2d ed. 1974).

Finally, the taxpayer cites language in the legislative history of an amendment to the Judicial Code eliminating the $10,000 ceiling on tax refund suits in the district courts, Act of July 30, 1954, Pub. L. No. 83-559, ch. 648, § 2(a), 68 Stat. 589, codified in 28 U.S.C. § 2402 (1970), to the effect that all taxpayers should have the benefit of a local remedy regardless of their financial status. H. R. Rep. No. 659, 83d Cong., 2d Sess., in U.S. Code Cong. & Ad. News 2716, 2717. Context indicates that the innocuous use of the word "all" in a committee report was not intended to effect the major revision of the law which taxpayer seeks; neither the amendment nor the report makes any reference to alienage.

The district court's order dismissing the complaint is affirmed.

IN THE UNITED STATES COURT OF CLAIMS.

No. 421-73.

ANTRANIK MALAJALIAN

v.

THE UNITED STATES.

Before COWEN, *Chief Judge*, DAVIS, SKELTON, NICHOLS, KASHIWA, KUNZIG and BENNETT, *Judges*.

Order.

This case comes before the court on defendant's motion for an order requiring plaintiff to appear and give testimony before a trial judge. Upon consideration of the motion and plaintiff's opposition thereto, IT IS ORDERED:

(1) The plaintiff, Antranik Malajalian, is hereby directed, pursuant to 28 U.S.C. § 2504, to appear before a trial judge of this court in Boston, Massachusetts, in order that he may be examined on oath by the attorney for defendant as to all matters pertaining to plaintiff's claim.

(2) The time and place of the hearing in Boston shall be fixed by the trial judge, and written notice thereof shall be given by letter mailed to the parties at least forty (40) days prior to the date of the hearing.

(3) In order to avoid the necessity of a second trip by plaintiff to the United States in the event a trial is ordered in this case, plaintiff may, at the completion of the examination by

defendant's attorney at the Boston hearing, present any admissible evidence, including his own testimony, which plaintiff would offer in support of his claim at such a trial.

(4) All proceedings at the hearing in Boston shall be reported and the transcript thereof filed with the clerk in accordance with the provisions of Rule 122.

(5) Plaintiff shall not be required to appear in Boston pursuant to this order unless the defendant shall agree to pay for plaintiff's air transportation (coach fare) from Beirut, Lebanon, to Boston, Massachusetts, and return, or to provide plaintiff such free transportation in aircraft owned or controlled by the United States. Within twenty (20) days from the date of this order, the defendant shall file with the clerk a notice stating its willingness to pay or provide such air transportation without expense to plaintiff and describing how and when the transportation or the cost thereof will be provided. At least thirty (30) days prior to the date fixed by the trial judge for the hearing in Boston, the defendant shall send the American Embassy in Beirut a copy of this order and a signed copy of its notice of willingness to provide plaintiff's air transportation to and from the hearing and request that the Embassy deliver such papers to the plaintiff.

BY THE COURT:

WILSON COWEN,
Chief Judge.

Entered March 14, 1975.

IN THE UNITED STATES COURT OF CLAIMS.

No. 421-73.

ANTRANIK MALAJALIAN

v.

THE UNITED STATES.

Before COWEN, *Chief Judge*, DURFEE, *Senior Judge*, DAVIS, SKELTON, KASHIWA, KUNZIG AND BENNETT, *Judges*.

Order.

This case comes before the court on a rule to show cause why plaintiff's petition should not be dismissed for his failure to comply with the court's order of March 14, 1975. Plaintiff's attorney appeared in his behalf, made an urgent plea that plaintiff be given one final opportunity to appear at a hearing to be held not earlier than January 1, 1976, and gave the court certain assurances in the event his request should be granted. Defendant's attorney also appeared, furnished the court with information showing that instead of being in the French Foreign Legion, as plaintiff had advised the trial judge on September 29, 1975, plaintiff is now listed by the French Foreign Legion as a deserter. Defendant's attorney also stated that the Government had incurred a considerable amount of expense in complying with the court's order of March 14, 1975. Upon consideration of the requests and contentions of the attorneys for the parties, the court concludes that the order of March 14, 1975, should be amended as follows:

Paragraph (2) thereof is amended by adding the following sentence:

> The trial judge shall fix the date for the hearing as soon after January 1, 1976, as he can conveniently do so, taking into account other cases which he has set for trial and similar commitments made by him.

Paragraph (5) of the order is rescinded, and the following is substituted therefor:

> Plaintiff shall be required to bear the cost of his transportation and other expenses required for attending the hearing without reimbursement by defendant. However, if plaintiff's attorney of record furnishes defendant's attorney of record with a statement as to where plaintiff resides in France or elsewhere, the attorney for defendant shall inform plaintiff's counsel, at a time to be fixed by the trial judge, when and where plaintiff can obtain a visa authorizing his entrance into the United States for the purpose of appearing and testifying at the hearing.

IT IS FURTHER ORDERED that if plaintiff fails to comply with the order of March 14, 1975, as herein amended, plaintiff's petition may be dismissed without the issuance of a rule to show cause or other notice.

BY THE COURT:
WILSON COWEN,
Chief Judge.

Entered November 14, 1975.

IN THE UNITED STATES COURT OF CLAIMS.

No. 421-73.

ANTRANIK MALAJALIAN

v.

THE UNITED STATES.

Before DAVIS, *Acting Chief Judge*, SKELTON, NICHOLS, KASHIWA, KUNZIG, AND BENNETT, *Judges*.

Order.

This case comes before the court on the trial judge's report of February 20, 1976, showing that:

(1) Pursuant to the court's order of November 14, 1975, the trial judge notified counsel for the parties that a hearing would be held in Boston, Massachusetts, on January 8, 1976, beginning at 10 a.m., and

(2) on December 30, 1975, the trial judge cancelled the hearing on the basis of information furnished by counsel that plaintiff would not be present.

Therefore, in accordance with the last paragraph of the court's order of November 14, 1975, IT IS ORDERED that plaintiff's petition be and the same is hereby dismissed.

BY THE COURT:
OSCAR H. DAVIS,
Acting Chief Judge.

Entered March 19, 1976.

No. 75-1824

In the Supreme Court of the United States

OCTOBER TERM, 1976

ANTRANIK MALAJALIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1824

ANTRANIK MALAJALIAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The question presented in this federal income tax case is whether petitioner's repeated failure to obey the Court of Claims' order that he appear at scheduled hearings and testify with respect to his tax claim justified dismissal of his refund suit.

The pertinent facts are as follows: In June, 1972, petitioner, allegedly a citizen of Lebanon who entered the United States on a visitor's visa, attempted to depart from Logan Airport in Boston, Massachusetts, on a flight to London (Pet. App. 1). An inspection of petitioner's baggage by airline personnel revealed that he was carrying approximately $147,000 in United States currency in small bills (Pet. App. 1-2). The airline personnel notified officials of the United States Customs Service of their discovery of the money. After a brief investigation, the Customs Service seized the money, but petitioner was allowed to depart the United States (Pet. App. 2). See *United States* v. *Tirinkian,* 488 F. 2d 873 (C.A. 2).

On June 26, 1972, the Commissioner of Internal Revenue terminated petitioner's taxable year, pursuant to his authority under Section 6851 of the Internal Revenue Code of 1954 (26 U.S.C.), and assessed income taxes and penalties of $131,331.[1] The assessment was satisfied from the approximately $147,000 seized from petitioner at the airport (Pet. App. 2). Thereafter, petitioner commenced this refund suit in the Court of Claims (Pet. 6).

On March 14, 1975, the Court of Claims ordered petitioner to appear at a hearing to be held in Boston to testify as to his tax claim (Pet. App. 7-8). After receiving instructions from petitioner's counsel as to the places where petitioner could be served with a copy of the court's order and an airline ticket, government counsel was unable to locate petitioner in either Beirut, Lebanon, or Lyon, France. After petitioner failed to appear at each of three hearings set within a six-month period, the trial judge, on October 3, 1975, recommended dismissal of petitioner's suit.[2] On the basis of that recommendation but with due regard to the "urgent plea" of petitioner's counsel that petitioner was in the French Foreign Legion,[3] the Court of Claims, on November 14, 1975, ordered *en banc* that

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[1] In *Laing* v. *United States*, 423 U.S. 161, the Court held that a notice of deficiency must be sent to a taxpayer within 60 days of a termination of a taxable year under Section 6851. A notice of deficiency was not issued to petitioner in this case. However, petitioner has never claimed at any stage of this litigation that the assessment was invalid. Thus, the only question presented is the propriety of the Court of Claims' dismissal of the suit.

[2] The trial judge's memorandum to the court dated October 3, 1975, is reproduced in the Appendix, *infra*, pp. 1a-4a.

[3] The government's information, subsequently confirmed by petitioner's counsel, was that petitioner was listed as a deserter from the French Foreign Legion (Pet. 6; Pet. App. 9).

another hearing be scheduled but provided that if petitioner "fails to comply * * * [his] petition may be dismissed" (Pet. App. 9, 10).

The new hearing was scheduled for January 8, 1976, and, upon information from petitioner's counsel that petitioner was in French Guiana, the government forwarded a copy of the court's orders of March 14, 1975, and November 14, 1975, to the nearest United States Consulate. However, petitioner's counsel later informed the court that petitioner would not be present at the scheduled hearing. On March 19, 1976, more than one year after petitioner was first ordered to appear, the court dismissed petitioner's suit (Pet. App. 11).

The Court of Claims did not abuse its discretion in dismissing petitioner's suit. Rule 102(b)(1) of the Rules of that court provides that "[u]pon its own motion, the court may dismiss any action at any time." The exercise of comparable authority by the federal district courts under Rule 41(b) of the Federal Rules of Civil Procedure was upheld in *Link* v. *Wabash Railroad Co.*, 370 U.S. 626, 629-630. There, this Court held—

> The authority of a federal trial court to dismiss a plaintiff's action with prejudice because of his failure to prosecute cannot seriously be doubted. The power to invoke this sanction is necessary in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts.

The failure of a plaintiff to appear before the court when ordered to do so, or to submit to a deposition, is grounds for dismissal of his suit. See, *e.g.*, *Buxton* v. *Aero Mayflower Transit Co.*, 18 Fed. Rules Serv. 2d 342 (C.A. 4); *Janousek* v. *French*, 287 F. 2d 616, 622 (C.A. 8); *Moore* v. *Island Creek Coal Co.*, 375 F. 2d 732 (C.A. 4); *Fischer* v. *Dover Steamship*

Co., 218 F. 2d 682 (C.A. 2). Petitioner's failure for more than a year to respond to or obey the Court of Claims' repeated orders that he appear before the trial judge to testify justified dismissal.[4]

Finally, petitioner contends (Pet. 8-9) that the dismissal of his action deprived him of property without due process of law, in violation of his rights under the Fifth Amendment to the Constitution. But procedural due process does not require personal service of each and every order of a court on a party in litigation, particularly on the party who instituted the action. What is required is "notice reasonably calculated * * * to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Tr. Co.*, 339 U.S. 306, 314. Petitioner presumably knew of the pendency of the tax refund suit he allegedly authorized, and his counsel received more

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[4]Petitioner's contention (Pet. 8) that dismissal is unfair when, as here, he could not be located ignores the fact that it was his "duty to keep the court informed of * * * [his] correct address, and this failure * * * clearly warrants the * * * court in dismissing for failure to prosecute when * * * [he] failed to appear * * * " *Buxton* v. *Aero Mayflower Transit Co., supra*, 18 Fed. Rules Serv. 2d at 344. See also *Mooney* v. *Central Motor Lines*, 222 F. 2d 569, 571-572 (C.A. 6).

Nor did any "great civil disorder in [petitioner's] country" (Pet. 2, 3) excuse his failure to appear before the court. There has been no showing that civil strife in Lebanon prevented petitioner from at least communicating his whereabouts to the court or his attorney. Moreover, it is far from certain that petitioner was ever in Lebanon during the pendency of the court's order. During these proceedings, counsel for petitioner repeatedly informed the court that petitioner was in the French Foreign Legion, stationed in France and subsequently in French Guiana. Thus, petitioner, by his own failure to act or even to inquire as to the status of his case, was responsible for the dismissal of his action.

than adequate notice of the scheduled hearings at which petitioner was ordered to appear.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

AUGUST 1976.

APPENDIX

OCTOBER 3, 1975

FILED OCT. 3, 1975

COURT OF CLAIMS

MEMORANDUM

To: The Court

From: Mastin G. White, Senior Trial Judge

Subject: *Antranik Malajalian* v. *United States*, No. 421-73

It is recommended that the plaintiff be ordered to show cause why his motion for summary judgment should not be denied, and why his petition should not be dismissed, for failure to comply with the court's order of March 14, 1975.

The court's order directed that the plaintiff (who was then supposed to be in Beirut, Lebanon) appear before a trial judge in Boston, Massachusetts, at a time and at a place in Boston to be fixed subsequently by the trial judge, in order that the plaintiff might be examined by defendant's counsel pursuant to 28 U.S.C. § 2504, and also in order that the plaintiff might present evidence in support of his claim. The order further provided that the plaintiff's transportation by air to and from Boston was to be provided by the defendant.

On March 19, 1975, defendant's counsel filed with the court a document stating in part that the defendant "is willing to provide plaintiff with air transportation from Beirut, Lebanon, to Boston, Massachusetts, and return for the purpose of appearing at such hearing."

After obtaining information from the attorneys for the parties regarding commitments that should be considered in fixing a time for the hearing in Boston, the

attorneys were informed by letters dated April 22, 1975, that the hearing would be held beginning at 10 a.m. on June 16, 1975, in the courtroom of the U.S. Tax Court on the 13th floor of the U.S. Customs House, 2 India Street, Boston, Massachusetts.

In a letter dated April 29, 1975, plaintiff's counsel furnished to defendant's counsel an address in Beirut, Lebanon, at which, it was said, service upon the plaintiff of court orders could be accomplished.

The documents to be served on the plaintiff in accordance with the court's order of March 14, 1975, were sent to the American Embassy in Beirut on April 28, 1975, and information concerning the plaintiff's address in Beirut, as furnished by plaintiff's counsel, was supplied to the Embassy by means of a telegram dated May 5, 1975. However, the Embassy reported in a telegram dated May 13, 1975, that the plaintiff was not in Beirut, so far as could be ascertained, and that he was not well known at the address provided by plaintiff's counsel.

In a letter dated May 30, 1975, plaintiff's counsel informed the trial judge that, due to the civil strife prevailing in Lebanon, he had not been able to get a call through to Beirut; and he requested that the hearing in Boston be rescheduled for sometime after the situation in Lebanon returned to normal.

In view of the uncertainty as to whether the plaintiff was personally aware of the hearing scheduled for June 16, 1975, the hearing was rescheduled to begin at 10 a.m. on July 14, 1975, in the same courtroom previously mentioned. This action was taken on June 6, 1975. Subsequently, the July 14 hearing was cancelled on the basis of information furnished by plaintiff's counsel to the effect that, because of the continuing civil strife in Lebanon, counsel had been unable to communicate with the plaintiff either by mail or telephone, and did not know whether the plaintiff had received notice of the hearing.

In a letter dated August 6, 1975, plaintiff's counsel informed the trial judge as follows:

> We have made contact with Mr. Malajalian who is in Lyon, France and not Beirut, Lebanon. If the government will notify an Embassy or Consul in France of its intention to pay the plane fare and pave the way for granting a visa, we shall arrange to have Mr. Malajalian present himself at an Embassy or Consulate for that purpose.

Thereafter, the trial judge informed the attorneys for the parties, by means of letters dated August 14, 1975, that the hearing in Boston was rescheduled to begin at 10 a.m. on October 7, 1975, in the same courtroom previously mentioned. The letter directed defendant's counsel to furnish plaintiff's counsel not later than September 5, 1975, information as to where and when the plaintiff should report for his air transportation and his visa in connection with the trip to Boston; and directed plaintiff's counsel to inform the plaintiff promptly relative to the rescheduling of the hearing, and to transmit to the plaintiff promptly the transportation and visa information when received from defendant's counsel.

In a letter dated September 3, 1975, defendant's counsel informed plaintiff's counsel that the plaintiff could obtain from the U.S. Consulate in Lyon, France, on or after September 10, 1975, a Government Travel Request entitling him to a round-trip airline ticket from the airport nearest Lyon to Boston, and that the plaintiff could also submit to that consulate his application for a visa. The letter stated that the visa application should be submitted not later than September 19, 1975.

On September 24, 1975, defendant's counsel reported to the trial judge that, according to information received from the U.S. Consulate in Lyon, France, neither the plaintiff nor his attorney had been in touch with the

consulate concerning transportation or a visa for the plaintiff in connection with the trip to Boston for the October 7 hearing.

In a letter dated September 29, 1975, plaintiff's counsel informed the trial judge that, according to information received from reliable sources, the plaintiff "is presently in the French Foreign Legion," and that the plaintiff "obviously will not appear on October 7, 1975 * * *."

Because of the plaintiff's unavailability, the arrangements for the holding of a hearing in Boston on October 7, 1975, were cancelled.

It seems to be clear from the preceding recital that the plaintiff does not intend to appear at a hearing pursuant to the court's order of March 14, 1975, for the purpose of being examined by defendant's counsel in accordance with 28 U.S.C. § 2504, or for the purpose of presenting evidence in support of his claim. Accordingly, it seems appropriate that the plaintiff be ordered to show cause why his pending motion for summary judgment should not be denied, and why his petition should not be dismissed, for failure to comply with the court's order of March 14, 1975.